Syarikat Zyliazan (Holdings) Sdn Bhd v Kadri bin Amat & Ors

HIGH COURT (TAWAU) — CIVIL SUIT NO TWU-22NCvC-31/10 OF 2015
ALWI ABDUL WAHAB J
28 FEBRUARY 2019

Civil Procedure — Damages — Assessment of damages — Whether the plaintiff is entitled for damages — Whether documentary evidence sufficient to prove damages and loss of profits — Whether defendants jointly and severally liable

On 16 August 2017, the plaintiff had successfully proved its case against the first and second defendants for which the plaintiff was entitled to damages against the two defendants. There were two pieces of land involved in the dispute, PT 20–07100310 and PT 20–07100311 which was used by the plaintiff for operating a oil palm plantation. It was to be assessed together with the accrued interest. Both defendants were not present in the hearing of the assessment of damages. At the main trial, the first defendant did not participate in any proceedings, but the second defendant was represented. The plaintiff's prayers for damages were, inter alia: (a) RM110,000 against the first defendant for part payment of the purchase price for PT 20–07100310 and legal fees of RM2,000 paid to Messrs Ting Rosen & Co; (b) RM29,000 against the second defendant being part payment of the purchase price for PT 20–07100310; (c) RM1,733,480.82 against the both defendants jointly and severally (excluding part payments for the purchase of lands) for cost expended by the plaintiff to develop both plots of land. This damages claimed represented actual expenditures incurred; and (d) RM628,452 against both defendants jointly and severally for loss of profit.

Held:

(1) Based on the documentary evidence exhibited in court, the court held that the plaintiff had succeeded in proving its losses and damages for its judgment dated 16 August 2017. Since both defendants did not participate in the hearing of the assessment of damages although notice had been served, particularly in respect of the second defendant. That being the case, the unchallenged evidence of the plaintiff ought to be accepted and admitted (see paras 9 & 11).

(2) With regards to the refund of part payments for the purchase price of the said lands. Based on the evidence of payment and payment vouchers, the plaintiff was entitled to the refund of the part payments of the purchase price of both plots of land paid to the first and second defendants for the sum of RM110,000 and RM29,000 respectively. The plaintiff was also

entitled to the refund of RM2,000 being the legal fees paid to Messrs Ting Rosen & Co (see paras 12–14).

(3) With regards to the expenditure on the land development, based on the documentary evidence, ie payment vouchers and invoices, the plaintiff had also proven its expenditure for the development of the said lands in the sum of RM1,733,480.82, to be apportioned equally between the first and second defendants as the said lands were adjoining to each other with the land size of 50 acres each (see paras 15–16).

(4) For the claim for loss of profit amounting to RM628,452, based on the evidence of PW1, the net profits of the plaintiff for years 2015 and 2016 were in the region of RM18,344.50 and RM51,483.72 respectively, averaging the net profits to RM34,914 per year. Since the plaintiff claimed for the loss of profit for 18 years, therefore he is entitled to: RM628,452 (RM34,914 x 18 = RM628,452). The loss of profit amounting to RM628,452 was to be borne in equal proportion between the first and second defendants (see paras 21–23).

(5) Based on the judgment dated 16 August 2017, the plaintiff was also entitled to the statutory interest on damages assessed. In this regard, the court allowed interest of 5%pa from 26 October 2015 (the date of filing of the suit) up to the date of judgment on assessment of damages and further interest at the rate of 5%pa from the date of judgment up to the date of payment (see para 24).

[Bahasa Malaysia summary

Pada 16 Ogos 2017, plaintif telah berjaya membuktikan kesnya terhadap defendan pertama dan kedua yang mana plaintif berhak menerima ganti rugi terhadap kedua-dua defendan. Terdapat dua bidang tanah yang terlibat dalam pertelingkahan, PT 20–07100310 dan PT 20–07100311 yang digunakan oleh plaintif untuk operasi tanaman kelapa sawit. Ia adalah untuk dinilaikan bersama dengan faedah yang terkumpul. Kedua-dua defendan tidak hadir pada pendengaran penilaian ganti rugi. Pada perbicaraan utama, defendan pertama tidak menyertai apa-apa prosiding, tetapi defendan kedua telah diwakili. Permohonan ganti rugi plaintif untuk kerugian, adalah (a) RM110,000 terhadap defendan pertama untuk bayaran separuh harga pembelian untuk dan yuran guaman berjumlah RM2,000 yang dibayar kepada Tetuan Ting Rosen & Co; (b) RM29,000 terhadap defendan kedua sebagai bayaran separuh harga pembelian untuk PT 20–07100310; (c) RM1,733,480.82 terhadap kedua-dua defendan secara bersama dan berasingan (tidak termasuk bayaran separuh untuk pembelian tanah-tanah) untuk kos yang dibelanjakan plaintif untuk membangunkan kedua-dua plot-plot tanah. Ganti rugi yang dituntut ini mewakili perbelanjaan sebenar yang ditanggung; dan (d) RM628,452 terhadap kedua-dua defendan secara bersama dan berasingan untuk kehilangan keuntungan.

Diputuskan:

(1) Berdasarkan keterangan dokumetar yang diekshibitkan di mahkamah, mahkamah memutuskan bahawa plaintif telah berjaya dalam membuktikan kehilangan dan kerugian untuk penghakiman bertarikh 16 Ogos 2017. Memandangkan kedua-dua defendan tidak menyertai di dalam pendengaran penilaian ganti rugi walaupun notis telah diserahkan, khususnya berkaitan dengan defendan kedua. Oleh yang sedemikian, keterangan yang tidak disangkal oleh plaintif mestilah diterima dan diakui (lihat perenggan 9 & 11).

(2) Berkenaan dengan bayaran balik bayaran separuh untuk harga pembelian tanah-tanah tersebut. Berdasarkan keterangan-keterangan bayaran dan baucar-baucer bayaran, plaintif adalah layak untuk pembayaran balik bayaran separuh untuk harga pembelian untuk kedua-dua plot tanah yang dibayar kepada defendan pertama dan kedua untuk jumlah RM110,000 dan RM29,000 masing-masingnya. Plaintif juga berhak untuk pembayaran semula berjumlah RM2,000 sebagai yuran guaman yang dibayar kepada Tetuan Ting Rosen & Co (lihat perenggan 12–14).

(3) Berkenaan dengan perbelanjaan untuk pembangunan tanah, berdasarkan keterangan dokumentar, iaitu baucar pembayaran dan invois-invois, plaintif juga telah membuktikan perbelanjaannya untuk pembangunan tanah-tanah berjumlah RM1,733,480.82, untuk dibahagikan sama rata di antara defendan pertama dan defendan kedua memandangkan tanah-tanah tersebut adalah bersebelahan dengan satu sama lain dengan saiz tanah berjumlah 50 ekar setiapnya (lihat perenggan 15–16).

(4) Bagi tuntutan kehilangan keuntungan berjumlah RM628,452, berdasarkan keterangan oleh PW1, keuntungan bersih untuk plaintif bagi tahun 2015 dan 2016 adalah dalam anggaran RM18,344.50 dan RM51,483.72 masing-masingnya, purata keuntungan bersih kepada RM34,914 setiap tahun. Memandangkan plaintif menuntut untuk kehilangan keuntungan untuk 18 tahun, oleh itu beliau adalah layak untuk: RM628,452 (RM34,914 x 18 = RM628,452). Kehilangan keuntungan berjumlah RM628,452 adalah untuk ditanggung dengan sama rata di antara defendan pertama dan kedua (lihat perenggan 21–23).

(5) Berdasarkan penghakiman yang bertarikh 16 Ogos 2017, plaintiff juga berhak untuk faedah statutori di atas ganti rugi yang dinilaikan. Berhubung dengan perkara di atas, mahkamah membenarkan faedah 5% setiap tahun dari 26 Oktober 2015 (tarikh pemfailan saman) sehingga tarikh penghakiman atas penilaian ganti rugi dan faedah lanjut pada

kadar 5% setahun daripada tarikh penghakiman sehingga tarikh pembayaran (lihat perenggan 24).]

Cases referred to

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102

Ganesh Nandy a/l BB Nandy @ GBB Nandy @ Gaanesh (Gaanesh & Co) for the plaintiff.
Unrepresented for the first and second defendants.

Alwi Abdul Wahab J:

INTRODUCTION

[1] On 16 August 2017, the plaintiff had successfully proved its case against the first and second defendants for which the plaintiff is entitled to damages against the first and second defendants to be assessed together with the accrued interest.

[2] The hearing of the assessment of damages was held on 29 October 2018. However both the first and second defendants were not present in this hearing on 29 October 2018 though duly served with the notice of hearing.

[3] In the main trial, the first defendant did not participate at all in any proceedings whilst the second defendant was represented by his counsel namely Tuan Hj Ansari bin Abdullah.

DAMAGES SOUGHT BY THE PLAINTIFF

[4] The plaintiff is seeking damages from the first and second defendants through his amended statement of claim, in verbatim as follows:

(a) as against the first defendant the sum of RM110,000 being payments made to him as part payments of the purchase price of PT 20–07100310 and the legal fee of RM2,000 paid to Messrs Ting Rosen & Co for preparing the first defendant's letter of offer to purchase and the first defendant's acceptance;

(b) as against the second defendant the sum of RM29,000 being payments made to him as part payment of the purchase price of PT 20–07100311;

(c) against the first and second defendants jointly and severally the sum of RM1,733,480.82 (excluding part payments for the purchase of lands)

expended by the plaintiff between May 2008 up to December 2011 to develop the lands PT 20–07100310 and PT 20–07100311 ('the said lands') and to construct roads and other structures on the said lands and this expenditure include, among others:

(i) clearing and felling the secondary jungle in the said lands;

(ii) construction of access road to the said lands and other secondary road inside the said lands;

(iii) carrying out terracing works in the said lands;

(iv) planting the said lands with oil palm crop;

(v) maintaining the oil palm crop planted in the said lands; and

(vi) constructing and building workers and staff quarters ('kongsi') in the said lands;

(d) against the first and second defendants jointly and severally loss of profit amounting to RM628,452 in being deprived of the profits in operating the oil palm plantation in the said lands for 18 years;

(e) the damages sought under (i)–(ii) above, represent part payments for the purchase price of the said lands applied respectively under PT No 20–07100310 and PT 20–07100311 while the damages sought under (iii) above represents actual expenditures that were incurred to clear, develop and plant the said lands with oil palm crop up to the stage of maintenance before harvesting took place; and

(f) the damages sought under (iv) above are for the loss of profit as a result of not being able to harvest the fruits for the next 18 years because this Honourable Court has ordered possession of the said lands to be delivered to the third defendant. The plaintiff had vacated the said lands on 31 December 2017. As a result, the plaintiff is deprived from enjoying the fruits of its labour and investment in the said lands.

THE HEARING OF ASSESSMENT OF DAMAGES

[5] The following witnesses are called to testify during the hearing of the assessment of damages held on 29 October 2018:

(a) Sia Tiong Guan (PW1);

(b) Sandrasegaran a/l Ayalsamy (PW2); and

(c) Marhuma bt Asis (PW3).

[6] The evidence of PW1 are as follows:

(a) PW1 is a chartered accountant and also the plaintiff's company auditor for a number of years;

(b) the nature of the plaintiff's business is oil palm plantation;

(c) the plaintiff has plantation in Kalabakan and Tingkayu;

(d) the income expenses statement pertaining to the plantation at Kalabakan were derived from the company's books and records;

(e) PW1 prepared the plaintiff's income statement for the financial year ended 31 December 2015 and the plaintiff's income statement for the financial year ended 31 December 2016 ('exh D');

(f) exh 'D' shows the plaintiff's net profit of RM18,344.50 and RM51,843.72 for the year 2015 and 2016 respectively;

(g) exh 'D' also shows the list of the plaintiff's operating costs which include fertilisers, salaries and wages, repairs and maintenance, etc; and

(h) according to PW1, the net profit for the year 2016 is more than the net profit for the year 2015 due to the following reasons:

(i) an increase in the average price of fresh fruits bunch (FFB) in 2016.

— the yield per acre in 2016 was less than that of 2015 as the yield had dropped but with the increase in the average price of FFB in 2016, the total revenue increased in 2016; and

(ii) the decrease in the operating costs in 2016.

— The decrease in the operating costs is largely due to the decrease in the repair and maintenance costs and the salary and wages;

[7] The plaintiff's witness PW2 has filed a witness statement which is marked as WSPW2. His evidence are as follows:

(a) PW2 is the managing director of the plaintiff;

(b) all the payments made pursuant to the payment vouchers referred to in bundle C(2) and C(3) were and are authorised by him;

(c) the payment vouchers in Bundles C(2) and C(3) were prepared by the plaintiff's employees/clerks who were either still working with the plaintiff's company or had already left the employment and they are as follows:

(i) Marhuma bt Asis has been working with the plaintiff since November 2005 up to now;

(ii) Janice A Roxas has been working as clerk with the plaintiff since January 2008 up to now;

(iii) Marlinah bt Mansur has been working with the plaintiff since sometime in March 2008 up to now;

(iv) Salmia bt Nusu has been working as a clerk with the plaintiff since January 2009 up to now;

(v) Salmiah bt Asis had worked with the plaintiff as a clerk from sometime in April 2006 until October 2016; and

(vi) Fatimah bt Sanusi had worked with the plaintiff as a clerk since sometime in April 2010 up to 2014;

(d) the duties of the abovenamed persons include the preparation of payment vouchers and other documents as instructed by PW2;

(e) PW2 can recognise the abovenamed persons' signatures and handwritings in the payment vouchers;

(f) the plaintiff has expended a total sum of RM1,733,480.82 in developing and planting the said lands; and

(g) all the documents including the payment vouchers found in Bundles C(2) and C(3) were prepared in this course of carrying out the business of the plaintiff.

[8] The plaintiff's witness PW3 has filed a witness statement which is marked as WSPW3. Her evidence are as follows:

(a) PW3 has been working with the plaintiff as a clerk since November 2005;

(b) PW3 and her colleagues namely Janice A Roxas, Salmiah bt Asis, Fatimah bt Sanusi, Marlinah bt Mansur and Salmia bt Nusu had prepared the payment vouchers found in Bundles C(2) and C(3);

(c) she can still recognise the handwritings and the signatures of her colleagues abovenamed mentioned and also the signatures of PW2 found in bundle C(2) and C(3).

FINDINGS

[9] Based on the documentary evidence exhibited in court, the plaintiff has succeeded in proving its losses and damages it sought as envisaged in the judgment dated 16 August 2017.

[10] The burden, therefore, shifts onto the defendants to challenge or refute what has been proven by the plaintiff through the evidence of its witnesses pursuant to ss 101–102 of the Evidence Act 1950.

[11] Both the first and second defendants did not participate in the hearing of the assessment of damages although notice had been served particularly in respect of the second defendant. In respect of the first defendant, a certificate of non-appearance was issued earlier on dated 8 March 2017. That being the case, the unchallenged evidence of the plaintiff ought to be accepted and admitted (*Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751).

REFUND OF PART PAYMENTS FOR THE PURCHASE PRICE OF THE SAID LANDS

[12] The plaintiff is entitled to the refund of the part payments of the purchase price of the said lands paid to the first and second defendants for the sum of RM110,000 and RM29,000 respectively.

[13] The plaintiff is also entitled to the refund of RM2,000 being the legal fees paid to Messrs Ting Rosen & Co for the preparation of the first defendant's letter of offer to purchase and the first defendant's acceptance.

[14] The evidence of payment for the above sums can be seen from the payment vouchers found in Bundles C(2) and C(4).

LAND DEVELOPMENT EXPENDITURE AMOUNTING TO RM1,733,480.82

[15] Based on the documentary evidence ie payment vouchers and invoices which can be found in Bundles C(2) and C(3), the plaintiff had also proven its expenditure for the development of the said lands in the sum of RM1,733,480.82 made up as follows:

(i)	land preparation including roadworks	RM578,402.90
(ii)	purchase of oil palm seedlings	RM159,000
(iii)	purchase of chemicals — pesticides, weedicide etc	RM45,762
(iv)	purchase of fertilisers and manure	RM540,214.70
(v)	construction of labourline (kongsi)	RM51,231
(vi)	purchase of cover crop (mucuna)	RM290
(vii)	work pass for workers	RM44,807.95
(viii)	security fee	RM45,500
(ix)	workers salary (up to the maintenance stage before harvesting)	RM268,272.27
	TOTAL	RM1,733,480.82

[16] The above expenditure incurred by the plaintiff for land development and preparation ought to be apportioned equally between the first and second defendants as the said lands were adjoining to each other with the land size of 50 acres each.

LOSS OF PROFIT AMOUNTING TO RM628,452

[17] Through the evidence of PW2 in WS-PW2, the plaintiff started to plant oil palm trees in the said lands sometime between December 2008 and March 2009. It was further stated that it took about 30 months for the plaintiff to develop and maintain the said lands planted with oil palm. To ensure the oil palm crops are free from being attacked by pests, the plaintiff had carried out weeding and regularly fertilising or manuring the said lands so that the plants grow healthy.

[18] PW2 further stated that the plaintiff started harvesting the oil palm fruits from the said lands sometime in the middle of 2011. With proper maintenance, the oil palm crop would yield fruits up to 25 years and PW2 estimated that the plaintiff would be able to harvest from the said lands until the year 2035.

[19] Based on the judgment dated 16 August 2017, the plaintiff had surrendered the said lands to the third defendant on the 31 December 2017 and since then the plaintiff is unable to enjoy the fruits of its own labour and investment in the said lands.

[20] The plaintiff is claiming from the first and second defendants for the loss of profit for the estimated period of 18 years counting from the year 2017 up to the year 2035.

[21] Based on the evidence of PW1, the net profits of the plaintiff for years 2015 and 2016 are in the region of RM18,344.50 and RM51,483.72 respectively. So, the average of the net profits of the plaintiff is RM34,914 per year.

[22] Since the plaintiff is claiming for the loss of profit for 18 years, it is therefore entitled to the sum of RM628,452 (RM34,914 x 18 = RM628,452).

[23] The loss of profit amounting to RM628,452 is to be borne in equal proportion between the first and second defendants ie each of the first and second defendants to pay to the plaintiff the sum of RM314,226.

INTEREST

[24] Based on the judgment dated 16 August 2017, the plaintiff is also entitled to the statutory interest on damages assessed. As such, I allow interest of 5%pa from 26 October 2015 (the date of filing of the suit) up to the date of judgment on the assessment of damages and further interest at the rate of 5%pa from the date of judgment up to the date of payment.

COSTS

[25] I order costs on a solicitors' client basis.

CONCLUSION

[26] I allow damages to the plaintiff as follows:

(a) *refund of part payments for the purchase price of the said lands:*

(i) as against the first defendant, the sum of RM112,000; and

(ii) as against the second defendant, the sum of RM29,000;

(b) land development expenditure amounting to RM1,733,480.82 to be equally apportioned between the first and second defendants;

(c) lost of profits amounting to RM628,452 which is also to be equally apportioned between the first and second defendants;

(d) pre and post-judgment interest of 5% each; and

(e) costs on a solicitors and client basis.

Order accordingly.

Reported by Addibah Adnan